

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

868

**BRIEF FOR APPELLANT
AND APPENDIX**

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8684

178

RUTH B. EVANS, *Appellant*,

v.

DONALD P. EVANS, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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No. 8684

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Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Appellant filed in the District Court of the United States for the District of Columbia a complaint for maintenance against her alleged husband (App. 1), as authorized by Section 16-415 of the Code of Laws for the District of Columbia, 1940 Edition. Upon motion of appellee the

district court entered a summary judgment dismissing the complaint (App. 11), from which judgment this appeal has been taken under authority of Section 17-101 of the Code.

STATEMENT OF THE CASE.

On June 17, 1943, appellant commenced in the district court an action for maintenance against appellee, alleging in her verified complaint that they were both residents of the District of Columbia, that they had married in 1921 which marriage had not been dissolved by any valid decree of divorce, that appellee had deserted her on December 14, 1938, that he had contributed towards her support until March 18, 1943, but that since then he had failed and refused to contribute anything towards her support or to make further payments on the home, owned by them jointly, in which she lived¹ (App. 1-3).

Appellee duly filed his answer (App. 4-7) in which he alleged that appellant was not his wife because on May 25, 1939, he had obtained in Nevada a decree of divorce from her, a copy of which he exhibited (App. 7-8). The decree recites that the court found that continuously for more than six weeks prior to the filing of his complaint plaintiff was in the State of Nevada with the intent to remain indefinitely and that he was an actual and bona fide resident of and domiciled in the State of Nevada; that defendant had been served with process in the District of Columbia on April 24, 1939, but had defaulted in appearing and pleading; and that plaintiff was entitled to a divorce on the ground of extreme cruelty.

Both by motion incorporated in his answer and by motion separately filed (App. 3-4), appellee requested the court to

¹The complaint also made demand for maintenance for a daughter of the parties living with appellant, but on Oct. 6, 1943, during argument before the lower court at which time it appeared that the daughter had passed the age of twenty and had become employed, and that appellee tendered willingness to assist her if necessary, it was orally stipulated that the court should treat the action as involving only the personal right of appellant. (Trans. 130-132).

dismiss the complaint or to grant a summary judgment in his favor on the ground that his Nevada decree was a bar to her action and on the further ground that she had been guilty of laches².

Thereafter, appellant took the pre-trial deposition of appellee which was duly filed in the case (Trans. 42 et seq.). Following this she filed her own affidavit in which she asserted that the purported divorce obtained by appellee in Nevada was absolutely void because of lack of jurisdiction by the Nevada court; that it had been fraudulently obtained by defendant who had falsely claimed to have been a resident of Nevada for more than six weeks before he commenced the action when in fact he had not been a bona fide resident for six weeks or at all, as was shown by his own statements and admissions contained in his deposition to which reference was made; that she had never appeared in the Nevada proceeding and that she had never done anything to submit herself to the jurisdiction of the Nevada court or to recognize any validity in the fraudulent decree of divorce (App. 8-9).

On October 6, 1943, the matter was heard upon the aforesaid motion to dismiss or for a summary judgment, and after argument the lower court ruled that upon the complaint and the answer, including the Nevada decree exhibited therewith, appellee was entitled to a summary judgment dismissing the complaint, and the court not only refused to consider the affidavit of appellant challenging the validity of the Nevada divorce or the deposition of appellee which appellant had taken, but clearly and unequiv-

²Appellee also moved the court to dismiss the complaint on the ground that it failed to state a cause of action and on the further ground, as asserted by him, that he was not a resident of the District but was a resident of Virginia. As to the first ground, the complaint clearly states every essential to an action for maintenance; and as to the second ground, the appellant being a resident of the District, appellee's place of residence is immaterial. *Rhodes v. Rhodes*, 36 App. D. C. 261. No contention is or can be made that appellee was not served with process in the District. Neither of these points was urged in argument or made the basis of the decision of the court below, and it is believed that appellee will not further urge them here.

ocally held that appellant was not entitled to any opportunity to establish by evidence that the Nevada decree was invalid because appellee had not been a *bona fide* resident of that State (App. 9-10).

Pursuant to this ruling, the court on October 15, 1943, entered a summary judgment dismissing the complaint, which judgment clearly shows by its recitals the limited issue upon which it was predicated (App. 11), and from this judgment this appeal has been prosecuted (Trans. 136).

STATEMENT OF POINTS.

1. The lower court erred in entering a summary judgment dismissing the complaint and thereby denying to appellant a trial on evidence of the disputed question of fact as to whether or not appellee had been a resident of Nevada at all or for the jurisdictional period of time before he obtained a divorce there.

SUMMARY OF ARGUMENT.

The summary judgment dismissing the complaint without trial on evidence was erroneously entered because:

(a). There was of record a genuine issue of fact with respect to whether or not appellee had been domiciled in Nevada at the time he obtained his claimed divorce, and as a matter of law the divorce was subject to collateral attack on the ground of lack of jurisdiction in the court which rendered it.

(b). The primary rule of jurisdiction to grant divorce is that one of the parties must be domiciled within the state, because to each state belongs the sovereign and exclusive right to regulate the status of its citizens and no power exists to change the status of citizens of other states. Any divorce granted in violation of this rule is void.

(c). The Federal Constitution does not require full faith and credit to be given to a void divorce rendered by a court without jurisdiction based on domicil.

(d). A divorce which is void because of lack of jurisdiction in the court which rendered it is not capable of being given any recognition by comity, and to enforce a void divorce granted on constructive service of process in such manner as to cut off the rights of the other spouse would be a violation of the due process clause of the Constitution.

(e). Apart from general principles of law, the Nevada divorce was void under the specific statutory requirements of that state unless appellee had been not only physically present but legally domiciled in the state for the entire period of six weeks next before the commencement of his action.

(f). The lower court did not base its judgment on the ground of laches, and appellant has in fact not been guilty of laches but commenced her action promptly after her cause of action for maintenance accrued.

ARGUMENT.

(a). Summary Judgment.

Defendant's separate motion to dismiss the complaint under Rule 12(b) of the Rules of Civil Procedure clearly was improper as the complaint unquestionably states a cause of action for maintenance and the other grounds specified were matters of fact pleaded in the answer by way of defense. The motion for a summary judgment incorporated in the answer was procedurally proper under Rule 56 of the Rules of Civil Procedure, but as provided in subdivision (c) of that rule a summary judgment can be rendered only if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In this case plaintiff had alleged a marriage to defendant which had not been dissolved by any valid decree of divorce. In his answer defendant pleaded his Nevada divorce to be

valid and effectual to have dissolved the marriage. Under Rule 7(a) of the Rules of Civil Procedure no reply to this answer was required or allowed unless ordered by the court, and defendant had not moved the court to require plaintiff to reply. Under Rule 8(d) the averments of the answer were deemed to be denied or avoided. Plaintiff, however, did not rest upon her technical position but in opposition to the motion for a summary judgment she filed her own affidavit denying the validity of the Nevada decree upon factual grounds and she took the deposition of defendant concerning the facts of his claimed domicile in Nevada. This affidavit and deposition, which the lower court refused to read or to consider, disclosed a clear and genuine issue of fact with respect to defendant's domicile, and the granting of the summary judgment of dismissal and the denial to plaintiff of the right to a trial and the opportunity to present all available evidence on the issue of fact presented can be sustained only if it be the law of this jurisdiction that a foreign decree of divorce, regular upon its face, is not subject to collateral attack for fraud and want of jurisdiction in the court which rendered it. The lower court based its decision squarely on the proposition of law as above stated (App. 9-10), and as to whether or not this was error is the only question presented on this appeal.

(b). **Primary Rule of Jurisdiction to Grant Divorce.**

The primary rule of jurisdiction governing the granting of divorces is that the courts of no state have jurisdiction to grant a divorce unless at least one of the parties is domiciled in the state, and a divorce granted in violation of this rule is void.

This rule is predicated upon the fundamental principles that marriage creates a status in which the state has a vital interest, that to each state belongs the sovereign and exclusive right to regulate the status of its citizens, and that it is imperative to the preservation of its social order that no

state permit a foreign state to interfere with the domestic relations of its citizens.

This rule has been so impregnably established in our system of jurisprudence by a current of decisions which has been unbroken from the earliest days of our government until the present time, and the reasons supporting it have been expounded by the courts so frequently that it might seem unnecessary even to mention it. However, the product of the divorce-market states results in such a constant pressure to evade this fundamental rule by ignoring it, by misapplying the principles of comity, or by unnecessarily involving it with other factors, that it is deemed appropriate to review the principal authorities in the chronological order of decision.

The first reported American case wherein the rule was recognized appears to be *Jackson v. Jackson*, 1 Johns 424, decided by the Supreme Court of Judicature of New York in 1806. In that case a woman who was a resident of New York brought a suit for divorce against her husband in Vermont which state at that time appears not to have had any residential requirements with respect to divorce. The husband, who likewise was a resident of New York, appeared in the case and contested it. The wife was awarded a divorce and alimony in a lump sum. Later, however, when she brought an action in New York to collect her alimony it was held that the Vermont decree was entitled to no recognition, the court saying:

“Here is a plain attempt by one of our own citizens to evade the force of our laws. The plaintiff, to obtain a divorce, which our laws do not allow, instituted her proceedings in Vermont, whilst she was an inhabitant, and an actual resident, of this state, and while her domicil continued within this state * * *. The plaintiff having acted with a view of evading our laws, it would be attended with pernicious consequences to aid this attempt to elude them.”

The next case is that of *Hanover v. Turner*, 14 Mass. 227, decided by the Supreme Judicial Court of Massachusetts in 1817. In that case Turner, while a resident of Massachusetts, obtained in Vermont a divorce from his wife. When the inhabitants of the town of Hanover sued him for necessities furnished his destitute wife, he set up his divorce in defense, but the same was held to be of no validity in Massachusetts, the court saying:

“If we were to give effect to this decree, we should permit another state to govern our citizens, in direct contravention of our own statutes; and this can be required by no rule of comity.”

In the year 1838 the Court of Appeals of Kentucky in *Maguire v. Maguire*, 7 Dana (37 Ken.) 181, declared the courts of Kentucky to be without jurisdiction to entertain a suit for divorce between persons neither of whom was a resident of that state. After affirming the proposition that marriage as a status is controlled by the state and is not subject to dissolution by consent of the parties, the court said:

“Marriage being, as already suggested, an organic institution in every civilized and well-regulated nation, no such nation can preserve its own social order, or enjoy its independent right to secure its own welfare in its own way, if any other sovereign could, without its consent, dissolve or disturb that domestic relation of its citizens which is most essential to its prosperity, moral power, and happiness. To concede such a right of foreign interference would be as suicidal in principle as to acknowledge foreign control over any other institution, or the *terra firma* of a state. And, therefore, it would seem to be sufficiently obvious, without the light of direct judicial authority, that no nation should ever arrogate any such power over the marriage contracts of foreigners, not domiciled within its jurisdictional limits, and that no free state, regardless of its rights or its dignity, should ever, by acquiescence, or otherwise, recognize any such assumed right of inter-

meddling with its domestic institutions by any foreign state."

In the case of *Leith v. Leith*, 39 N. H. 20, decided by the Supreme Judicial Court of New Hampshire in 1859, the facts were as follows: Leith who with his wife was domiciled in New Hampshire went to Indiana where upon a false affidavit as to his residence he obtained a divorce. He married another woman and his wife sued him for divorce upon the ground that his cohabitation with his putative second wife was adulterous. He relied upon his Indiana divorce but the same was held to be void. In its opinion the court said:

"Questions of marriage and divorce are not so much questions of contract as of status or condition; and according to the well settled principles of international law, that every nation has exclusive sovereignty and jurisdiction within its territory, and that no government can exercise a direct authority beyond the limits of its dominion, the status of every actual bona fide resident, as married or single, must be determined according to the law of the domicil, without reference to the law of the place of the marriage, or of the place where the delictum occurred."

And after stating the established doctrine to be that a divorce obtained in a jurisdiction where the applicant has no actual permanent residence *animo manendi* is void, the court further said:

"To give effect to a divorce thus obtained would be an infringement of the sovereignty of the State of the domicil over its own citizens, as it would recognize the right of a foreign jurisdiction to declare judicially the status and condition of a husband and wife in reference to the marriage relation, both of whom are domiciled here, and when neither by becoming an actual resident there had carried the relation into that jurisdiction."

In the case of *Hoffman v. Hoffman*, 46 N. Y. 30, the Court of Appeals of New York in 1871 held that a divorce obtained

by the husband in Indiana at a time when both he and his wife were domiciled in New York was void and constituted no defense to a subsequent suit for divorce brought by the wife. In speaking of the Indiana decree the court said that a contract of marriage which was regarded in New York as a solemn obligation was a mere farce if it could thus be dissolved, and that to give recognition to the decree would be "to allow any other State substantially to make laws for this State; to regulate not only our domestic relations of husband and wife, but almost every other right."

Next in order comes the case of *People v. Dawell*, 25 Mich. 247, decided in 1872 by the Supreme Court of Michigan in an opinion, written by the great Judge Cooley, which unquestionably is one of the most enlightening opinions ever written on the subject of foreign divorces. The facts in the case were as follows: Dawell and his wife were residents of Michigan. The wife obtained a divorce in Indiana where she falsely claimed to be a resident. To enable her to get the divorce Dawell appeared in the case, waived process, and filed an answer admitting the false allegation as to the wife's residence. Dawell remarried but he was prosecuted and convicted of bigamy notwithstanding the Indiana divorce which was held to be invalid.

At the outset the Court stated the question to be:

"Does the state of Michigan establish and control the domestic relations of its own citizens, or do they exist and continue only at the discretion of the inferior courts of another state?"

And in answer it said:

"Now I understand the rule to be that to give the courts of any state jurisdiction over the marriage relation between a husband and his wife, one of the parties, at least, must have a domicile within that state. Some of the judicial decisions make further requirements; but no court has ever held that any less could be demanded. It is, then, and must be, admitted on all hands, that while these parties had their residence

within this state, the courts of Indiana had no authority to consider the question of divorcing them."

In answer to the argument that the Indiana court had found as a matter of fact that the parties resided in that state and that this finding was conclusive upon the question except in the same court in a proceeding to vacate the decree, the court said:

"That doctrine brings us to this: That although the Indiana court had no jurisdiction to divorce two of our citizens, yet, having assumed to do so, on the false statement of one or both of the parties, that they resided in Indiana, the decree is absolutely binding, unless the court sees fit to vacate it. In other words, the marriage relation between two of our citizens depends upon the discretion of a foreign court, which by law had no concern with it whatever. Such a doctrine is not only monstrous in its results, but it has, as I conceive, no support whatever in authority. It has been held invariably, that a foreign judgment is open to be assailed by evidence showing a want of jurisdiction."

Utah while still a territory experimented with a statute which authorized her courts to grant divorces not only to her own residents but to any person who "wishes to become" a resident. Divorces granted to nonresidents under this provision met with complete disaster.

The first case is that of *Hood v. The State*, 56 Ind. 263, decided by the Supreme Court of Indiana in 1877. Hood obtained in the Territory of Utah a divorce in a proceeding wherein he alleged that he wished to become a resident of that territory but that he was so situated that he could not at that time carry his desires into effect. Neither Hood nor his wife had ever been in Utah. Hood remarried and was convicted of fornication, it being held that the Utah divorce was inoperative and utterly void. The court said:

"This is a question to be decided by the *jus gentium*, the law of nations, the first principles of which are that all nations, in respect to rights, are equal, and

that each is sovereign within its own territory, with jurisdiction over the persons and property therein.”

The court points out that while divorces may be granted by legislative act no state has the power by such act to divorce residents of other states and therefore can confer no such power upon its judiciary, and in scathingly denouncing the action of the Utah court in granting a divorce to a man who himself informed it that he was the subject of another jurisdiction and not subject to the laws of Utah, the court said:

“The divorce manifestly was granted in violation of the sovereignty and jurisdiction of another state, and in violation of the plainest principles of international and constitutional law. The provision in the statute of Utah authorizing the courts to grant divorces to citizens of foreign states and nations, who were not, but desired to become residents of Utah, was *ultra vires*, and void. No plainer or more palpable case of the exercise of extra-territorial jurisdiction could exist.”

Exactly the same situation was before the Supreme Court of Minnesota in the case of *State v. Armington*, 25 Minn. 29, decided in 1878. Armington had obtained a divorce in the Territory of Utah at a time when both he and his wife were residents of Minnesota. Upon his attempted remarriage he was indicted for polygamy and the Utah divorce upon which he relied was held to constitute no defense, the court saying:

“To each state belongs the exclusive right and power of determining upon the status of its residents and domiciled citizens and subjects, in respect to the question of marriage and divorce, and no other state, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any subjects, when neither of them has become *bona fide* domiciled within its limits; and any judgment rendered by any such tribunal, under such circumstances, is an absolute nullity.”

In the same year, 1878, the Supreme Court of New York, First Department, in the case of *People v. Smith*, 13 Hun 414, held that a decree of divorce obtained by a man in the Territory of Utah where neither he nor his wife had ever been and which on its face showed that he had not become a resident of Utah but only contemplated becoming one, was an absolute nullity unavailable for any purpose and that it constituted no defense to a charge of criminal abandonment of his wife and children.

Also in the year 1878, the Supreme Court of Kansas in the case of *Litowich v. Litowich*, 19 Kan. 451, had before it a proceeding where in defense to a suit for alimony brought by the wife the husband set up a decree of divorce previously obtained by him in the Territory of Utah where neither of them had ever been. In holding the decree to be "void absolutely and entirely" the court stated the rule which rendered divorces obtained under such circumstances void for want of jurisdiction and ineffectual to change the status of the parties to be in accordance with the unbroken current of authority.

In 1880 the Supreme Court of Iowa, in the case of *State v. Fleak*, 54 Iowa 429, held that in a prosecution for adultery where the defendant set up a divorce obtained by him in the Territory of Utah the state was entitled to introduce evidence to prove that the defendant was not a resident of Utah when he obtained the divorce in which event the divorce would be absolutely void for want of jurisdiction.

In her early days Colorado had a statute which permitted divorces to be granted to non-residents for matrimonial offenses committed within that state, but in the case of *Van Fossen v. State*, 37 Ohio St. 317, decided in 1881, the Supreme Court of Ohio held that a divorce granted under said statute was void. The facts were that both Van Fossen and his wife were domiciled in Ohio but she obtained a divorce in Colorado upon the ground of an offense alleged to have been committed there. Upon his remarriage he was convicted of bigamy notwithstanding the fact that he pleaded

in defense the said divorce obtained by his first wife. In declaring the invalidity of the Colorado decree the court said:

“The courts of one state have no jurisdiction over any marital offense, or cause of divorce, wherever arising, unless one of the parties has an actual *bona fide* domicile within the state, * * * nor does it alter the case that the alleged marital offense was committed within the state where the divorce is sought, or that the parties submit to its jurisdiction.

“What is wanting in such case is jurisdiction over the subject matter. Marriage is a status exclusively regulated and controlled by the laws of the state where the relation exists.”

The validity of another Utah divorce was passed upon by the Supreme Judicial Court of Massachusetts in the case of *Hardy v. Smith*, 136 Mass. 328, decided in 1884. The facts were that a man and his wife who were residents of Massachusetts entered into an agreement whereby the wife obtained a divorce in Utah. The wife swore to a libel, the husband signed an acknowledgment of service and a consent to be defaulted, and the papers were sent to Utah where neither of them had ever been. The divorce later was brought into question in connection with the settlement of an estate. It was held not only that the divorce could have no force and effect in Massachusetts because of a statute in that state but that since neither party had been in Utah the decree was wholly void for want of jurisdiction in the court which granted it.

The case of *Smith v. Smith*, 19 Neb. 706, decided by the Supreme Court of Nebraska in 1886, involved a divorce obtained in Utah by a man who at the time was a resident of Nebraska. Upon his remarriage his first wife sued him for a divorce on the ground of adultery, and the Utah decree was held to be an absolute nullity and to constitute no defense. In its opinion the court after affirming the principle that marriage creates a status concluded that “no one state

has the power to fix, regulate, or control such status as to the citizens of any other state," and that at least one of the parties must be a resident of the state granting the divorce or there is nothing before the court upon which it can act.

The case of *Gregory v. Gregory*, 78 Me. 178, decided by the Supreme Judicial Court of Maine in 1886, involved a divorce obtained by a man who while a resident of Maine went temporarily into Illinois for the purpose of obtaining a divorce and there obtained it at a time when his wife was also a resident of Maine. In an action involving the wife's right to dower the Illinois decree was held to be invalid, the court saying:

"Marriage is a civil status. * * * The state has the absolute right to determine or alter the civil status of all its inhabitants. * * * But the state has this power only over its own inhabitants. The mere presence within its territory of the inhabitants of other states gives it no authority to fix or change their status. The state of their residence still retains its control over that. It alone can free its citizens from marital obligations. Any proceedings of another state to that end will be ineffectual and will be disregarded elsewhere."

In the case of *Watkins v. Watkins*, 125 Ind. 163, decided by the Supreme Court of Indiana in 1890, it was held that in a suit for divorce brought by the wife wherein the husband pleaded in bar a decree of divorce previously obtained by him in the Territory of Montana the wife was entitled to establish the invalidity of said decree by showing that it was obtained at a time when both of the parties were residents of Indiana. The court said:

"Where neither the plaintiff nor defendant is a resident of the State or Territory in which a decree of divorce is pronounced its courts have no jurisdiction, and their decree is void."

And with respect to the fundamental principle upon which the rule as stated is based, namely, that the marriage rela-

tion is a status subject to control only by the state of domicile, the court concluded that the question was so completely set at rest by the authorities that a discussion was unnecessary.

In the cases of *Bell v. Bell*, 181 U. S. 175, and *Streitwolf v. Streitwolf*, 181 U. S. 179, both decided in 1901, the Supreme Court of the United States held, in each case, that where a divorce had been granted in a state where neither of the parties was domiciled the court was without jurisdiction and the decree was not entitled to full faith and credit elsewhere. In neither case, however, did the court expound the underlying principles.

In the case of *Andrews v. Andrews*, 188 U. S. 14, decided in 1903, the Supreme Court recognized and applied to their fullest extent the broad fundamental principles of jurisdiction which, as hereinbefore has been shown, had been so firmly established by the state courts. The facts in this notable case were as follows: At a time when both he and his wife were domiciled citizens of Massachusetts, Andrews went to South Dakota where after simulating a residence for the length of time required by the statute of that state, not in good faith but solely for the purpose of obtaining a divorce, he filed a petition for divorce upon a ground which occurred in Massachusetts but which was not there a cause for divorce. His wife appeared in the case and at first she undertook to contest it, but later, for a money consideration, she discontinued the contest and consented to the granting of the divorce. Andrews then returned to Massachusetts and remarried. After his death the first wife and the putative second wife both claimed to be his lawful widow and entitled to administer his estate. By virtue of a Massachusetts statute which prohibited recognition being given to divorces obtained under circumstances like the one in question, the first wife prevailed. The case went to the Supreme Court of the United States on the contention that the Massachusetts statute violated the full faith and credit clause of the Federal Constitution. The constitutionality of the statute was sustained. The reasoning of the court

may be stated in condensed form as follows: Marriage is so interwoven with the very fabric of society that it cannot be dissolved by the mere consent of the parties. Each state possesses as an essential attribute of government the authority to legislate over the subject of marriage which is inherently domestic in its nature and upon which the existence of civilized society depends. If the citizens of one state may go into another state and procure a divorce in fraud of the law of the domicil and then compel the state of domicil to give full force and effect to the divorce thus obtained the existence of all efficacious power on the subject of divorce will be at an end. Each state, therefore, must have exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution. Where domicil within the state is wanting there is no jurisdiction over the subject-matter of divorce. Where jurisdiction over the subject-matter of divorce is lacking it cannot be conferred by the appearance or consent of the parties. The full faith and credit clause of the Constitution has no application to decrees rendered by courts without jurisdiction.

In disposing of the contention that the appearance of the wife in the case vested the South Dakota court with jurisdiction, the court said:

“But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject matter which appearance or consent could not give. Indeed, the argument but ignores the nature of the marriage contract and the legislative control over its dissolution which was pointed out at the outset. The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: That marriage may not be dissolved by the consent of the parties,

but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicile and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicile to give effect to such judgment despite the prohibition of the law of the domicile and the rule of public policy by which it is enforced.”

The case of *Lister v. Lister*, 86 N. J. Eq. 30, decided by the Court of Chancery of New Jersey in 1915, contains a most lucid exposition of the principles under consideration. In that case the husband, at a time when both he and his wife were residents of New Jersey, went to Nevada where after simulating a residence for the statutory period he obtained a divorce. The wife appeared in the case and contested it unsuccessfully. Notwithstanding this, the wife later brought suit in New Jersey for maintenance and the Nevada decree, which was interposed in defense, was held to be void. The court said:

“A decree of divorce operates immediately and absolutely upon the status of the suitor which is the *res* in suit. No execution, attachment or contempt proceedings are necessary in order to enforce the decree. From the very nature of the case, however, a decree of divorce by a court in Nevada undertaking to dispose of the status in respect of marriage of spouses who are not resident in the state, would be a decree in the air. A husband and wife domiciled in New Jersey, while passing through the State of Nevada on a railroad train, certainly could not get off at Reno and immediately give a Nevada court jurisdiction to determine their status in respect of marriage, and dissolve their marriage even if the legislature of Nevada should undertake to give the courts of the state such extraordinary power. An act of the legislature of a state undertaking to divorce all married persons who pass through the state on a railroad train, would never be recognized by courts of other states as having the slightest trace of validity apart from all objections to such legislative action arising from federal or state constitutions. The State of Nevada is powerless by an act of its legisla-

ture, or by a decree of its court to fix the status of a man or woman as married or unmarried, when such man or woman is only transiently commorant within the borders of the state. The question whether a man is married, or is a citizen, or is a voter cannot arise in the State of Nevada unless the man is a *bona fide* resident of the state, for the reason that it is the nature of such a status that it pertains to individuals who are permanently located in the place where the status is to be recognized or denied. A spouse commorant in Nevada but actually resident in New Jersey, has no more power as against the State of New Jersey to carry his status in respect of marriage from the State of New Jersey into the State of Nevada so as to subject such status to the power and control of the State of Nevada, exercised through its courts by an action *quasi in rem*, than he has to lift up a tract of land in New Jersey which he owns and transport it to the State of Nevada, so as to subject it to an action *quasi in rem* in a Nevada court. Where the *res* is land it is manifest that it cannot be moved out of the state where it lie. When the *res* consists of chattels it is equally clear that such *res* can be transported and located successively in very many states, and thus made subject to the power of such states exercised through courts, legislatures or other governmental agents. When the *res* is a status in respect of marriage, it can be transported in a certain way, viz., by transporting, or in other words, changing the residence of the party whose status is under consideration.

“The authorities I think all sustain the proposition that there is no principle of comity which interferes with the power of the State of New Jersey, in accordance with its well settled law, to deny the right of any court in Nevada to determine the status of the defendant in this case in respect of marriage, or to decree that he is an unmarried man unless he ceased to be a *bona fide* resident of New Jersey and became a *bona fide* resident of Nevada.”

Even the State of Nevada, which is notorious for its divorces granted to the citizens of other states who most brazenly feign residence there for the purpose of divorce,

has recognized through its highest court that as a matter of law its courts have no jurisdiction to grant a divorce unless at least one of the parties has a domicile in the state. In the case of *Worthington v. District Court*, 37 Nev. 212, 142 P. 230, the Supreme Court of Nevada in 1914 declared that to permit citizens of other states to apply for a divorce without obtaining a domicile there would be "contrary to the doctrine universally recognized in other states and in foreign civilized countries."

All of the cases hereinbefore cited have been selected because they have recognized and discussed the bedrock fundamentals of jurisdiction. No attempt has been made to cite the multitudinous state cases which involve and apply the rule. Space has not been taken to cite the many cases which have refused recognition to divorces granted to American domiciliaries by foreign countries, notably the ridiculous Mexican mail-order decrees, which immediately are seen to be void by the application of the fundamental rule of jurisdiction.

Under the subdivision of this argument entitled "Comity" (*post*) will be found citation to the District of Columbia cases decided by this court, all of which conform with the rule of jurisdiction under discussion and several of which, particularly *Holt v. Holt*, expound the underlying principles.

It is asserted with confidence that no case can be found in which any appellate court has held that a divorce granted in a state where neither spouse is domiciled was valid. Professor Beale says that such divorces

"have universally been held invalid in all courts, even though the libelee appeared and assented to the jurisdiction or though the cause for divorce was given within the state."

—*Beale, Treatise on the Conflict of Laws*, 478 (1935).

(c). **Full Faith and Credit Under Federal Constitution.**

Article IV, Sec. 1, of the Constitution of the United States makes it obligatory that each state give full faith and credit to a decree of divorce validly obtained at the place of domicile of one of the spouses. *Atherton v. Atherton*, 181 U. S. 155; *Thompson v. Thompson*, 226 U. S. 551; *Davis v. Davis*, 305 U. S. 32.

The Constitution, however, does not require full faith and credit to be given to a divorce which is void because obtained in a state where neither spouse is domiciled. *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Andrews v. Andrews*, 188 U. S. 14.

In the highly controversial case of *Haddock v. Haddock*, 201 U. S. 562, the Supreme Court went even further and held that a divorce obtained *in a state where the plaintiff was a bona fide resident* against a nonresident spouse upon constructive service of process was not entitled to obligatory enforcement in the state of last matrimonial domicile if it appeared that the person obtaining the divorce was the matrimonial wrong-doer. The decision in the *Haddock* case, and particularly the *obiter* in the opinion to the effect that such a divorce was valid within the state where granted, gave rise to the pernicious doctrine that a person could be divorced in one state and not in another.

Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, decided December 21, 1942, expressly overruled the *Haddock* case, but it went no further and is careful so to state. In that case a conviction for the crime of bigamy was reversed solely upon the ground that the trial court had erroneously instructed the jury that a Nevada divorce based upon constructive service of process and in which the demendant made no appearance would not be recognized in North Carolina.¹ No other question was passed upon, as the Court is at pains to point out, the above instruction being held sufficient to require a reversal, the Court saying "... the verdict of the

¹It is to be observed that the instruction complained of was erroneous even under the rule of the *Haddock* case.

jury for all we know may have been rendered on that ground alone . . .”

Most particularly the court points out that the case was not decided upon the question of the *bona fides* of the residence in Nevada, saying:

“If the case had been tried and submitted on that issue only, we would have quite a different problem, as *Bell v. Bell* indicates. We have no occasion to meet that issue now and we intimate no opinion on it. However it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that petitioners’ domicil in Nevada was a sham and a fraud. Rather we must treat the present case for the purposes of the limited issue before us precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there.”

And further:

“But the question for us is a limited one. In the first place, we repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. *Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada.*” (Italics supplied).

Although it is obvious that the Supreme Court in the *Williams* case not only did not hold the Nevada divorce before it to be valid and merely send the criminal case back for further proceedings upon proper instructions, but that it went to unusual pains to spell out just what it was doing on the limited issues before it in order to prevent any misunderstanding, it unfortunately has resulted in the wide-

spread misconception that all "Reno" and similar divorces are now sacrosanct. Such was the argument advanced by the appellee in this very case in the court below, and which it is anticipated he will repeat here, by totally disregarding the issues decided, by completely ignoring the careful delineation of the scope of the decision in the opinion itself, and by removing for quotation sentences without regard to their context.

The *Williams* case, giving it its fullest possible effect which is as stated in the majority opinion that it overruled the *Haddock* case, merely restores the law as it was before the *Haddock* decision, which was and now is simply that a divorce granted in conformity with local jurisdictional requirements in the state of domicile of one of the parties, even upon constructive service of process, is valid there and is entitled to full faith and credit everywhere, but that a divorce granted in a state which is the domicile of neither party is void there and not entitled to full faith and credit elsewhere.

(d). **Comity.**

Appellee may argue here that the challenged divorce in this case, although not entitled to obligatory full faith and credit, may be recognized by comity; and such seems to have been the thought of the justice of the lower court who justified his unusual action by saying that he would follow "the spirit of the decision in the *Williams* case and the modern decisions" (App. 10), whatever that may mean.

The recognition of foreign divorces by comity, however, always has been restricted to those cases which came within the *obiter* of the *Haddock* case to the effect, as generally understood, that a divorce rendered in the state of domicile was valid there and that while for other reasons it might not be entitled to Constitutional obligatory enforcement elsewhere it could be given extraterritorial recognition by comity.

In the District of Columbia, the only foreign divorces which have received recognition with the approval of this

court, by comity or otherwise, have been those obtained at the place of domicil. *Atkinson v. Atkinson*, 65 App. D. C. 241, 82 F. (2d) 847; *Hellmuth v. Hellmuth*, 69 App. D. C. 64, 98 F. (2d) 431; *Goodloe v. Hawk*, 72 App. D. C. 287, 113 F. (2d) 753; *Curley v. Curley*, 74 App. D. C. 163, 120 F. (2d) 730. In the thoroughly considered case of *Kraskin v. Kras-kin*, 70 App. D. C. 85, 104 F. (2d) 218, which refused on the grounds of public policy to recognize by comity a Maryland divorce obtained by a resident of that state, this court clearly gave clear recognition to the rule that the first requirement for the extraterritorial enforcement of a divorce by comity was that it be validly rendered in the state of domicil and enforceable within the borders of that state.

A divorce granted without the jurisdictional basis of domicil is void even in the state where granted and is incapable of being given any recognition elsewhere.

Not only have the state courts consistently refused to give any recognition to such void divorces, as hereinbefore has been shown, but this court has refused recognition to every divorce which has come before it which was obtained in a state which was not the place of domicil of the person obtaining it. *Jacobi v. Jacobi*, 45 App. D. C. 442; *Diggs v. Diggs*, 53 App. D. C. 56, 288 F. 262; *Friedenwald v. Friedenwald*, 57 App. D. C. 13, 16 F. (2d) 509; *Simmons v. Simmons*, 57 App. D. C. 216, 19 F. (2d) 690; *Benson v. Benson*, 59 App. D. C. 271, 40 F. (2d) 159; *Frey v. Frey*, 61 App. D. C. 232, 59 F. (2d) 1046, *Frazier v. Frazier*, 61 App. D. C. 279, 61 F. (2d) 920; *Holt v. Holt*, 64 App. D. C. 280, 77 F. (2d) 538; *Sears v. Sears*, 67 App. D. C. 379, 92 F. (2d) 530.

To cut off the rights of one spouse by giving effect to a void divorce obtained by the other spouse in a court without jurisdiction upon constructive services of process would seem to be direct violation of the due process clause of the Constitution.

"If a State attempts to exercise power by creating interests with respect to persons or things which it has

no jurisdiction to create, its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself."

Restatement of the Law of Conflict of Laws, Sec. 43.

The reason the due process clause of the Constitution has not been more thoroughly explored with respect to divorces is undoubtedly due to the lack of necessity to have done so because of the unanimity with which the courts have rejected void decrees under the full faith and credit clause, and because during the era of *Haddock v. Haddock* the rule of comity was kept within its proper scope.

Now that the *Haddock* case has been overruled by the *Williams* case there would seem to be no further need for the rule of interstate comity. As the Constitutional situation now stands, a divorce is either valid where granted and entitled to obligatory enforcement everywhere or it is void where granted and incapable of being enforced anywhere.

No consideration is given here to the doctrine of estoppel which in certain cases may preclude the right to challenge the validity of a divorce, because no estoppel is involved or claimed in this case.

(e). **Statutory Requirements of Nevada.**

Although it is believed that this case is governed by the broad principles hereinbefore discussed, it is to be noted that in addition to the basic requirement of domicile the divorce statutes of Nevada require that domicile within the state shall have existed for a minimum of six weeks before an action for divorce can be brought.

"It is the settled law of this state that in order to obtain a divorce the plaintiff must be a bona fide resident of the State of Nevada and have an actual domicile therein, and that he must have been physically and corporeally present for a period of six weeks next preceding the filing of an action for divorce. This court has announced that mere residence in the state for the

statutory period solely for the purpose of obtaining a divorce is not sufficient to give the court jurisdiction.”
—*Lamb v. Lamb* (decided March 5, 1937), 57 Nev. 421, 65 P. (2d) 872.

So it is seen that if appellant's contentions are established to be true, the divorce obtained by appellee is void not only under general principles of jurisdiction but also under statutory law of Nevada, and that even if he were domiciled in that state but for less than the minimum period prescribed by statute his divorce is void in Nevada. See *Jacobi v. Jacobi*, 45 App. D. C. 442; *Sears v. Sears*, 67 App. D. C. 379, 92 F. (2d) 530.

(f). **Laches.**

The lower court expressly did not base its action on the ground of laches (Trans. 130), but anticipating that it may be urged here by appellee the matter will be discussed briefly. In *Bliss v. Bliss*, 60 App. D. C. 237, 50 F. (2d) 1002, a woman was denied the privilege to obtain financial benefit by establishing in a collateral proceeding the invalidity of a divorce, which she claimed she herself fraudulently had obtained nine years before, on the ground, among others, that she had been guilty of laches. In that case, however, there was in addition to long delay a clear estoppel to impeach a decree which had been obtained by her, a point fully recognized in the later case of *Curry v. Curry*, 65 App. D. C. 47, 79 F. (2d) 172.

In the present case appellant's cause of action for maintenance did not arise until, as alleged by her in her complaint and as admitted by him in his answer, appellee discontinued contributing towards her support on March 18, 1943, only several months before she brought her action. It is true that the action was not commenced until nearly four years after appellee had obtained his purported divorce, and the only foundation for any claim of laches would be that a duty devolved upon appellant to bring some sort of a legal proceeding to test the validity of the divorce. An

action for divorce brought by her for desertion could not have been commenced until two years after the separation, which occurred only shortly before appellee obtained his Nevada divorce, but a person who does not want a divorce cannot by any known rule of law be under a duty to sue for one. The only other method by which the Nevada divorce could have been tested here would have been an action for a declaratory judgment, but there is no rule of law which requires a person to obtain a declaratory judgment in order to prevent the later defense of limitations or laches to a cause of action which has not yet accrued. Of course, appellant could have made a direct attack against the divorce in Nevada, but there was no more legal obligation to do that than there was voluntarily to have appeared and submitted herself to the jurisdiction of the foreign court for the purpose of defending the action in the first place. No lawyer who has had experience with the manner in which the Reno divorce mill is operated would have advised her to step into any such trap as that. By all rules of law, appellant is entitled to have her status protected by the courts of her own domicil.

If appellee's Nevada divorce was valid he was under no duty thereafter to have supported appellant. The fact that he did so until March, 1943, is commendable in itself but having lulled her into a feeling of false security he ought not now complain of laches because she did not sue him sooner.

"In equity, lapse of time is not so accurate a criterion for determination of the question of laches as the facts and circumstances of the case."—*Walker v. McIntire*, 41 App. D. C. 380.

Respectfully submitted,

WILLIAM R. LICHTENBERG,
National Press Building,
JEAN M. BOARDMAN,
Southern Building,
Attorneys for Appellant.

APPENDIX

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8684.

RUTH B. EVANS, *Appellant*,
v.
DONALD P. EVANS, *Appellee*.

APPENDIX.

1 Endorsed: Filed Jun 17 1944 Charles E. Stewart, Clerk.

District Court of the United States for the District of
Columbia

Civil Action, File No. 20120

RUTH B. EVANS, *Plaintiff*,

v.

DONALD P. EVANS, *Defendant*.

Plaintiff's address is 3519 35th Street, N.W., Washington,
D. C.

Complaint For Maintenance

1. Plaintiff and defendant are both residents of the District of Columbia.

2. They were married on November 19, 1921, in New York City, and their marriage has not been dissolved by any valid decree of divorce.

3. They have one living child, Ruth Jean, who was born August 11, 1923. A son who was born June 1, 1926, died March 18, 1943.

4. On December 14, 1938, defendant without cause deserted plaintiff and since then he has not lived with her.

5. Before March 18, 1943, defendant contributed towards the support of plaintiff and their children in a manner not always satisfactory to plaintiff but to the extent that she did not deem it advisable to commence court action. Since the date last mentioned defendant has failed and refused to contribute anything towards the support of plaintiff but he has given their daughter the total amount of \$300.00.

6. Plaintiff is employed by the United States Social Security Board at the salary of \$1440 less deductions for retirement pay and taxes. She has no other income and the daughter of the parties is dependent upon her for support and education.

2 7. Defendant is employed by the Bureau of the Budget at the salary of \$6,820 a year.

8. Plaintiff and defendant own as joint tenants a dwelling house known as 3519 35th Street, N. W., Washington, D. C., which is occupied by plaintiff and their daughter. The property is worth approximately \$10,000 and is encumbered to the extent of approximately \$3600 on account of which the payments have been \$65.00 a month. Before March 18, 1943, defendant kept up the payments on the property but since then he has paid nothing. Taxes on the property amount to about \$180.00 a year, and are now one year in default. Foreclosure proceedings are now being threatened because of the default in the payments on the property.

WHEREFORE, plaintiff demands judgment for maintenance for herself and daughter, and for all other relief to which she may be entitled.

WILLIAM R. LICHTENBERG,
National Press Building,

JEAN M. BOARDMAN,
Southern Building,
Attorneys for Plaintiff.

I, Ruth B. Evans, upon my oath say that I have read the above complaint and that I believe it to be true.

RUTH B. EVANS,
Plaintiff.

SUBSCRIBED AND SWORN TO before me in the District of Columbia this 16th day of June, 1943.

MARY C. BEVANS,
Notary Public, D. C.

* * * * *

11 Endorsed: Filed Jun 24 1943 Charles E. Stewart,
Clerk.

Motion To Dismiss Complaint For Maintenance

Comes now the defendant by his attorney, David A. Hart, and moves to dismiss the complaint filed herein in accordance with Rule 12(b) of the Federal Rules of Civil Procedure; the grounds of this motion are as follows:

1. The complaint fails to state a claim against the defendant upon which relief can be granted.

2. That plaintiff is not the wife of defendant, as evidenced by the Decree heretofore issued in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, under date of May 25th, 1939, photostatic copy of which is hereto attached and prayed to be read as a part hereof.

3. That the Court lacks jurisdiction over the person of the defendant, he being a bona fide legal resident of the State of Virginia.

4. That the plaintiff is guilty of undue delay and laches.

5. That the plaintiff has not stated any cause of action as would entitle her to relief in a Court of Equity.

DAVID A. HART,
Attorney for Defendant,
 815 15th Street, N.W.,
 Washington, D. C.

* * * * *

4 Endorsed: Filed Jun 24 1943 Charles E. Stewart,
 Clerk.

Answer of Defendant to Complaint; Motion to Dismiss

Comes now the defendant, Donald P. Evans, by his attorney, David A. Hart, and for answer to the complaint filed herein says as follows:

First Defense.

The complaint fails to set forth any cause of action whatever upon which relief can be granted by this Court.

Second Defense.

This defendant moves to dismiss the complaint filed herein for the reason set forth in the Motion heretofore filed in this cause, together with the points and authorities filed in support thereof, and more particularly because the plaintiff is not the legal wife of the defendant herein, as evidenced by the Decree of Divorce heretofore granted in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, under date of May 25th, 1939, a photostatic copy of which is hereto attached and prayed to be read as a part hereof. This defendant moves to dismiss the complaint filed herein or for a summary judgment.

Third Defense.

Plaintiff's cause of action is barred by its own laches.

Fourth Defense.

Answering the complaint ad seriatim this defendant says as follows:

1. This defendant admits that plaintiff is a resident of the District of Columbia, but emphatically denies that he is a resident of said District, but on the contrary is a legally bona fide resident of Arlington County, State of Virginia, residing at No. 2929 North Oxford Street.

2. This defendant admits that plaintiff and defendant were married on November 19, 1921, in New York City, but emphatically denies that said marriage has not been dissolved by a valid decree of divorce.

3. He admits the allegations contained in paragraph three of said complaint.

4. He emphatically denies that on December 14, 1938, he without cause deserted plaintiff, but he admits since that date he has not lived or cohabited with plaintiff as his wife.

5. This defendant in answer to paragraph five of the complaint avers that he has always contributed liberally to the support of his family, but has no knowledge, information or belief as to whether the manner of such support was satisfactory to plaintiff, so accordingly neither admits or denies that allegation, but demands strict proof thereof. Answering the last sentence of said paragraph five, he admits that he has contributed nothing toward the support of plaintiff, for the reason that she is not his legal wife. This defendant avers that he has contributed liberally to the support of his daughter, now nearly twenty years of age, and furthermore, he expects and intends to so support his daughter as long as she requires his financial assistance.

6. This defendant has no information or knowledge as to the plaintiff's employment, nor the salary she receives from such employment, so can neither admit or deny the same, but if material to his defense, demands strict proof thereof.

Answering the second sentence of paragraph six of said complaint, this defendant on information and belief avers that plaintiff at one time owned one-third interest in some property in New York City, the value which interest is unknown to this defendant, or is he informed as to what, if any, income she derives from said property.

7. This defendant admits he is employed by the Bureau of the Budget at the salary of \$6,820 per anum, but
6 avers that he has deductions from his salary for retirement and taxes and Victory Bond of aproximately One Hundred Seventy-Five Dollars (175) per month.

8. Answering paragraph eight of said complaint this defendant admits the allegation that plaintiff and defendant own as joint tenants a dwelling house known as 3519 35th Street, Northwest, Washington, which is occupied by plaintiff and his daughter; he further avers that the largest portion of the money was furnished by him for the purchase of said premises; he further avers that the house at the time he purchased it was valued at about \$15,000; he admits that the property is encumbered to the extent of approximately \$3600. Answering paragraph eight further, this defendant avers that he has on numerous occasions requested plaintiff to join in with him in refinancing the said property, but plaintiff has refused to do so; that due to her persistent refusal, and the many expenses defendant is under at the present time, he has been unable to keep up the payments on the said property. He has no information or knowledge as to foreclosure proceedings being threatened because of default in the payments on the property.

For further answer to paragraph eight, defendant says that he has contributed the sum of One Hundred Dollars (\$100.) a month for the last three months for the support of his daughter, and intends to contribute to the support of his daughter as long as she needs his financial assistance.

WHEREFORE, the defendant having fully answered the bill of complaint prays that this action be dismissed with

all reasonable costs, or that a summary judgment be granted the defendant.

DONALD P. EVANS,
Defendant.

Subscribed and sworn to before me this 23 day of June, 1943.

MARGARET RAEDY,
Notary Public, D. C.

DAVID A. HART, *Attorney for Defendant.*

* * * * *
(*Exhibit*)

7 No. 61811 Dept. No. 1

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe

DONALD P. EVANS, *Plaintiff,*

v.

RUTH BECKER EVANS, *Defendant.*

Findings of Fact, Conclusions of Law and Decree

This cause came on regularly this day for trial before the Court, the plaintiff appearing in person and by his attorneys. The defendant did not appear in person and she was not represented by an attorney. Evidence duly was introduced and the case was submitted for decision. Thereupon the Court rendered its decision in favor of the plaintiff.

The Court finds: That continuously for more than six weeks prior to filing the Complaint herein, plaintiff was in the State of Nevada with the intent to remain indefinitely, and plaintiff still and now is an actual and bona fide resident of and domiciled in the State of Nevada; that defendant duly and regularly was served with process herein by the delivery to her in person by Harry C. Allen, a disinter-

ested citizen of the United States, over the age of twenty-one years, of certified copies of the Complaint and summons and by the showing to her of the original summons in the City of Washington, District of Columbia, on the 24th day of April, 1939; that all the allegations of the Complaint are true. The defendant's default for not appearing or pleading herein within the time allowed by law duly has been entered according to law. And as a conclusion of law the Court finds that plaintiff is entitled to an absolute and final decree of divorce from defendant upon the ground of defendant's extreme cruelty toward plaintiff, all in form and manner alleged and set out in the Complaint and as shown more particularly by the evidence herein.

Now, Therefore, by virtue of the law and the facts, it hereby is Ordered, Adjudged and Decreed that plaintiff hereby is granted a decree of divorce, final and absolute in form and effect, from the bonds of matrimony heretofore existing between the plaintiff and defendant, restoring each of said parties to the status of an unmarried person.

The Court expressly reserves jurisdiction to make whatever orders it may deem proper concerning the custody, support, maintenance and education of the minor children of plaintiff and defendant.

Dated: May 25, 1939.

WM. McKNIGHT, *District Judge.*

* * * * *

111 Endorsed: Filed Aug. 27, 1943 Charles E. Stewart,
Clerk

Affidavit of Plaintiff

I, Ruth B. Evans, upon my oath say: The purported divorce obtained by defendant in Nevada and pleaded by him in defense to my action is absolutely void because of lack of jurisdiction by the Nevada court and was fraudulently obtained by defendant who falsely claimed to be a resident of Nevada for more than six weeks before he com-

menced action when in fact he had not been a bona fide resident for six weeks or at all, as is shown by defendant's own statements and admissions contained in his deposition heretofore taken by plaintiff herein and to which reference is hereby made. Plaintiff never appeared in the Nevada proceeding and she has never done anything to submit herself to the jurisdiction of the Nevada court or to recognize any validity in the aforesaid fraudulent decree of divorce. * * *

112

RUTH B. EVANS, *Plaintiff*

Subscribed and Sworn to before me in the District of Columbia this 24th day of August, 1943.

Notary Public, D. C.

* * * * *

Oral Opinion of the Court

(Rendered following argument of counsel on October 6, 1943.)

132 The Court: Now then, it comes down to the question, elimination laches, as to whether the validity of the divorce in Nevada that was granted to the husband should be recognized by this court or whether the
133 question of the validity of that divorce should be gone into by this court by taking evidence and hearing testimony in the case. The Court is of the opinion that it will sustain the motion for summary judgment and dismiss; and it is going to recognize the validity of the divorce, if that is the thing that supports that motion, granted to the husband against the wife; and, accordingly, the suit will be dismissed.

Mr. Boardman: Just to get the record straight and cleared up: does your Honor take that action, of course, without any consideration of the testimony which we took in the deposition? Do you hold as a matter of law—

The Court (interposing): I am taking into consideration the proceedings in this case consisting of the bill of

complaint and the exhibits to the bill, the answer, and the motion to dismiss and for summary judgment, and the exhibits annexed to the answer, which are a part of the answer—Is that right, Mr. Hart?

Mr. Hart: Yes.

The Court: Now, the testimony taken on deposition would be considered if the case went to trial on the issue of fact as to the validity of the Nevada divorce.

Mr. Boardman: Yes.

The Court: Therefore, the Court is not going into the deposition taken in regard to a question of fact as to the validity of the divorce. I think that makes it clear.

Mr. Boardman: I think that does make it clear; you are not going into the questions of fact as to whether he is a bona fide resident of Nevada or not.

The Court: If I were going to do that I could not
134 make the ruling I made.

Mr. Boardman: We do not want the question to be in doubt in the Court of Appeals.

The Court: The matter has to be faced. I do not state the reasons. The Supreme Court indicated a man was married in one state and divorced in another state may be guilty of bigamy in one, and that makes the children legitimate in one state and bastards in another. If that be so, I do not know where we are headed. But I am going to follow the spirit of the decision in the *Williams* case and the modern decisions, and since we have forty-eight states and the District of Columbia, and if the Constitution says each state shall give validity to the decisions of the other states I will do it here. If the plaintiff in this case wishes to attack the validity of the divorce in Nevada, let her go to Nevada and take proceedings there. That gives you both a clean-cut decision.

* * * * *

135 Endorsed: Filed Oct. 15, 1943, Charles E. Stewart,
Clerk.

Summary Judgment of Dismissal.

This action having been heard upon the motion of defendant to dismiss the complaint and for a summary judgment in his favor, and the court having considered the complaint and the answer including the exhibit attached to and made a part of the answer, but not having considered the affidavits and depositions on file or taken any testimony, it is by the court this 15th day of October, 1943,

ADJUDGED that the motion of defendant to dismiss the complaint and for a summary judgment is granted and the complaint is dismissed.

DANIEL W. O'DONOGHUE,
Justice.

* * * * *

BRIEF FOR APPELLEE

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

IN THE

FILED SEP 1 1944

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8684

RUTH B. EVANS, *Appellant,*

v.

DONALD P. EVANS, *Appellee.*

Appeal from the District Court of the United States for the
District of Columbia.

DAVID A. HART,
Bowen Building,
Attorney for Appellee.

BERNARD MARGOLIUS,
Bowen Building,
Of Counsel.

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RUTH B. EVANS, *Appellant*,

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DONALD P. EVANS, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF ON BEHALF OF APPELLEE.

ISSUE INVOLVED.

The issue to be decided on this appeal is simple and may be succinctly stated in the negative as follows: That a decree of divorce rendered by a Nevada court upon substituted service cannot be challenged in this jurisdiction on the ground that the moving party in the Nevada proceedings was not a bona fide domiciliary of that jurisdiction. Otherwise stated, a finding of domicil by the Nevada court upon

which a divorce decree is based is binding in the courts of the District of Columbia.

SUMMARY OF ARGUMENT.

It is the appellee's contention, sustained by the court below, that the jurisdictional finding of domicile by a court granting a divorce is binding upon the courts of other jurisdictions and the decree entitled to full faith and credit. The recent case of *Williams v. North Carolina*, 317 U. S. 287, holds that a divorce obtained on substituted service of process satisfies procedural due process and is a binding decree. That is to say, substituted service is as effective to give a court jurisdiction over the person of a defendant as personal service.

In *Davis v. Davis*, 305 U. S. 32, the Supreme Court held that a finding of domicile by the court rendering a decree of divorce, when the defendant appears and litigates the issue, is binding on every other court upon the well established principles of *res adjudicata*. This latter principle is equally applicable if the court has jurisdiction over the person of the defendant but that person fails to appear and contest the issues which are necessarily adjudicated by the decree. Consequently, it is the position of the appellee that the *Davis* case, when considered in the light of the *Williams* case, required as the only logical position the ruling rendered by the lower court.

Unless this rule is followed, the overruling of the *Haddock* case will serve no useful and practical purpose, for this country would again be faced with the anomalous phenomena of a husband with two wives or a wife with two husbands, or children legitimate in one state and illegitimate in another, which will continue to prey upon the social order and the family institution. Courts would then be in no position to recognize foreign divorce decrees under the rule of comity. The new rule would be that a divorce is either valid or invalid. The consequences would be even more severe than those resulting from the *Haddock* decision.

ARGUMENT.

On May 25th, 1939, appellee obtained from the Second Judicial Court of the State of Nevada a decree of divorce from the appellant. In the Findings of Fact and Conclusions of Law made by the Nevada court, appears an express finding "that continuously for more than six weeks prior to the filing of the Complaint herein, plaintiff (appellee herein) was in the State of Nevada with the intention of remaining indefinitely, and plaintiff still and now is an actual and bona fide resident of and domiciled in the State of Nevada; that defendant (appellant herein) duly and regularly was served with process herein by delivery to her in person * * * (in the District of Columbia) of certified copies of the Complaint and summons". (Appellant's Appendix 7.)¹

On June 17th, 1943, more than four years after the decree, appellant instituted this proceeding in the lower court against the appellee for maintenance. (Appellant's App. 2.) In defense, appellee pleaded the Nevada decree as a bar to the relief sought. Appellant thereupon attacked the validity of the Nevada decree on the grounds that the decree was void because of lack of jurisdiction in the Nevada court and that it was fraudulently obtained on false testimony of residence. On appellee's motion to dismiss, Mr. Justice O'Donoghue ruled that the court was without power to inquire into the question of appellee's domicile in Nevada, and that it would give full faith and credit to the decree and the findings contained therein. The motion to dismiss accordingly was granted.

The decision of the lower court presents to this court, pointedly, the question of whether or not the factual determination of domicile by the courts of one state in granting

¹ Section 9460, Nev. Comp. Laws 1929, as amended Laws 1931, p. 161, provides in part: "Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following causes, or any other causes provided by law. . . ."

a decree of divorce, precludes inquiry into the same subject in a collateral attack upon that decree in another jurisdiction. It is submitted that it does.

Article IV, Section 1, of the Constitution directs that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State". Congress, in exercising its power to make effective this section has provided by the Act of May 26, 1790, R. S. 905, 28 U. S. C. 687, that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken". *Hempton v. M'Connel*, 3 Wheat. 234, 235.

In interpreting this provision, the Supreme Court of the United States recently had occasion to note that it required that "not some, but full" faith and credit be given judgments of a state court. *Williams v. North Carolina*, 317 U. S. 287, 294; *Davis v. Davis*, 305 U. S. 32, 40. As the Court said in the *Williams* case, there are but few exceptions to the strict and rigid application of the full faith and credit clause, "since the very purpose of Art. IV, §1, was 'to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation' ".

Employing this philosophy as its basis, the Supreme Court in the *Williams* case, overruled the leading case of *Haddock v. Haddock*, 201 U. S. 562, and held that a Nevada divorce decree obtained on constructive or substituted service, in accordance with Nevada law, was entitled to recognition by every court throughout the land, notwithstanding the policy of North Carolina against recognition of such decrees. It is submitted that this decision justifies the action taken by the court below in the present case in dismissing the complaint and that the ruling should be affirmed.

At the outset, appellee concedes that the Supreme Court in the *Williams* case did not expressly decide the question now before this court. The Court assumed, for the basis of that case, that the petitioners were domiciliaries of Nevada. A careful analysis and a clear understanding of the spirit of that decision, together with a proper consideration of related cases, however, will lead to but one logical conclusion, namely, that a decree of divorce of the Nevada court, otherwise entitled to full faith and credit, cannot be denied recognition by reason of a finding by a court of another jurisdiction of lack of domicile.

The alleged right to question in a collateral proceeding the domicile of a party who obtained a divorce in another jurisdiction must be founded upon the cases of *Bell v. Bell*, 181 U. S. 175, and *Andrews v. Andrews*, 188 U. S. 14. In the earlier case of *Cheever v. Wilson*, 9 Wall. 108, the court said that at that time it was an open and undecided question whether a court could challenge a jurisdictional finding of domicile in a foreign divorce decree. In the *Andrews* case, the Supreme Court held that Massachusetts could decide for itself whether an individual, who left that state to go to another, to there obtain a divorce, had established a bona fide domicile in that other state which would give the courts of that state jurisdiction. The theory of the decision was that the jurisdiction of a court over the subject matter and the parties could always be inquired into by the courts of another jurisdiction called upon to enforce the judgment of the former court. Relying upon *Thompson v. Whitman*, 85 U. S. 457, and explaining its holding in *Bell v. Bell*, 181 U. S. 175, the Supreme Court held in effect that domicile could be questioned even though the defendant appeared in the divorce proceedings and even if the record contained a specific finding in support of the jurisdiction.

The rationale of these decisions is that a finding of jurisdiction to render a judgment or decree could not preclude the courts of another jurisdiction from inquiring into the matter and making a contrary finding, and as a result permit the latter to avoid giving full faith and credit to the judgment or decree.

In *Davis v. Davis*, 305 U. S. 32, however, the rationalization of the *Andrews* and related cases is destroyed; and while the court does not expressly overrule those cases, it is submitted that it necessarily does so by implication. Thus, in the *Davis* case, the Supreme Court held that if a defendant wife enters an appearance in a divorce case to challenge the domicile of her husband, but without success, she is forever barred from again litigating that question; consequently, the courts of another jurisdiction are without power to override the finding of domicile made in the original decree. The numerous cases cited in appellant's brief all announce the principle of the *Andrews* case. All were decided *before* the *Davis* case.

It is impossible to reconcile the *Davis* and *Andrews* cases. The *Andrews* case holds that the question of jurisdiction over the subject-matter is *always* open to challenge regardless of defendant's appearance. The *Davis* case holds that it is not. Moreover, the underlying theory of the *Andrews* case cannot be squared with the new and present interpretation of the scope of the full faith and credit clause pertaining to divorce as found in the *Williams* case. If the divorce decree in the *Davis* case was entitled to full faith and credit, the decree in the present case must be so entitled, in light of the *Williams* case. To hold otherwise would mean that full faith and credit would be withheld or granted depending upon the appearance or non-appearance of the defendant in the original divorce proceeding. Thus, the dilemma and confusion in the field of domestic relations would be far greater than that which the Supreme Court admittedly sought to cure in the *Williams* case. By refusing to appear in a divorce case, the defendant spouse would have it within his or her sole power to challenge a divorce decree at any time.

As appellant points out in her brief, the setting aside of *Haddock v. Haddock* destroyed the principle of comity in recognition of interstate divorces. Today, a divorce decree is either entitled to full faith and credit or it is entitled

to no recognition at all. The court's former right to exercise its discretion in such matter is now gone. Thus, to accept appellant's position would permit a non-appearing defendant spouse to wield a powerful weapon; to assume a vindictive and retaliatory attitude. She could stand by and do nothing, thereby allowing her husband to remarry on the strength of his newly acquired divorce, have children by his new wife, affect property rights and interests, and then, at a time and under circumstances which would suit her convenience, ask a court of law to decree the divorce null and void.

Under such circumstances, just as under the situation in the *Williams* case, most clearly "a rule would be fostered which could not help but bring considerable disaster to innocent persons and bastardize children hitherto supposed to be the offspring of lawful marriages, * * * or else encourage collusive divorces". *Williams v. North Carolina, supra*. Certainly, this cannot be and should not be the law.

Moreover, the courts of a state having a strict standard of morality with respect to divorce would be possessed of a method by which to avoid the *Williams* case. It would be possible for the original defendant in a collateral action to submit original evidence in regard to the question of domicile during the suit for divorce and get a new finding on it, and, in event that finding was repugnant to the ruling which the first tribunal, in weighing and sifting the evidence before it, was led to make on the same point, to thereupon claim and insist that such opposite determination was sufficient to annul the divorce decree. Under this view, the fate of the prior judgment might depend on the slightest circumstantial difference between the evidence originally given and the evidence produced in the collateral proceeding. The whole thing might hinge on differences of opinion in regard to matters of inference and concerning the appellant's intention. Indeed, the evidence might turn on considerations still further removed from reliable criteria. The final result, with all its immediate consequences, might

in the last analysis come to depend on the idiosyncrasies or the acquired peculiarities of the judge trying the case. It is well known that the question of domicile is one of the most controversial known to the law; the ultimate finding depending entirely upon what one might believe to be an intention which can only be gathered as a result of inferences and circumstances. These may be subject to double interpretations. The courts of Nevada, presumably, are equally as capable of making a determination of such a factual question as are the courts of this jurisdiction. The *Davis* case, it is submitted, was the first indication by the Supreme Court that it would not permit the full faith and credit clause of the Federal Constitution to be avoided upon such flimsy pretexts. A Nevada decree should not be found to be inoperative at one time and operative at another, as judges in different jurisdictions might differ from each other on the mixed question of law and fact whether the appellant was an actual resident of a state when he sued for the divorce. The risk of upsetting marriages entered into in good faith, of rendering children illegitimate, and of upsetting property rights acquired as a result of action taken after divorce, should not be made to depend upon a finding which, as stated above, could vary so greatly, depending upon inferences to be drawn by particular individuals hearing the evidence. To accept appellant's position would recreate the anomaly which the Supreme Court has said should not exist—"that a husband without a wife, or a wife without a husband," is unknown to the law.

The *Davis* case is bottomed upon well established principles of *res adjudicata*—an issue once litigated is forever settled between the same parties. This rule must apply, regardless of whether there was an actual contest of the issue, for it is equally well settled that whatever might have been contested or raised, is settled by the judgment. 2 *Freeman on Judgment*, (5th Ed. 1925) 662 and authorities cited.

A recent case in New York demonstrates the principle just stated. In *Frost v. Frost*, 23 N. Y. Supp. 2d, 754, the

court refused to inquire into the question of domicile in Nevada, where the defendant appeared but failed to contest that issue. The court there stated:

“The Nevada court had jurisdiction of the subject-matter in the sense that it had power to grant or withhold a decree of divorce. It had jurisdiction over the person of the plaintiff in that action (the defendant here) in consequence of the complaint which she had filed. It had jurisdiction over the defendant in that action (the plaintiff here) by his voluntary submission to its jurisdiction by an attorney authorized to appear for him. One of the issues which it was necessary to determine in that action was the wife’s residence within the State, and that issue the Nevada Court decided in her favor. The question of her residence could have been litigated by the husband had he desired to litigate it then. That he did not do. Not having done so, the determination is as conclusive upon him as the determination of any other issue of fact. He may not now assert that the issue of residence was not correctly determined on account of an imposition practiced by the defendant on the Nevada court or on account of collusion of the parties. The fraud of which he complains was fraud perpetrated on the Nevada court in respect to the very issue which was submitted for determination. Against fraud of that character courts of other States do not accord relief, even if it be assumed that relief is available at all.”

The Supreme Court, in the *Williams* case, holds that a divorce decree obtained by substituted service of process is as binding in another jurisdiction as one obtained by personal service. This means, necessarily, that jurisdiction of the person of the defendant is acquired in conformity with due process. Being before the court, it is incumbent upon a defendant to contest the divorce and the issues involved, and upon a failure to do so the defendant is in the same position as one who did and was unsuccessful. Thus, if a defendant is required to appear but refuses, his position, it is submitted, is no different than the position of the defendant in the *Davis* case, who appeared and challenged

the jurisdiction. 2 *Freeman on Judgments* (5th Ed. 1925) 662.

This reasoning is sound when it is borne in mind that domicile in a divorce case is never presumed, but always must be proven by evidence. It is an issue in the case to be determined just as any other issue must be, before a decree can be granted. It is of the same character as the very question of the cause of divorce. The statutes of Nevada, which this Court may judicially notice, (*Cheever v. Wilson, supra*) provides that "in all civil cases where the jurisdiction of the court depends upon the residence of one of the parties to the action, the Court shall require corroboration of the evidence of such residence". Section 9467.02, Nev. Comp. Laws, 1931, p. 277.

An annotation to the *Williams* case, appearing in 143 ALR 1296, suggests that the position taken by the trial court in this case, and urged by the appellee herein, is the only practical one, in the light of the *Davis* case. It so clearly expresses the appellee's contention and demonstrates its logic that appellee takes the liberty to quote it at length:

"Grating that domicil within the state in which the divorce decree is rendered should not be dispensed with as a jurisdictional element, it may be advisable to except divorce cases from the general rule that jurisdictional facts are always subject to inquiry by the court in which recognition is sought of a foreign judgment, and to make binding upon the court in which the validity of the foreign divorce is questioned, the findings of jurisdictional facts as to domicil by the foreign court rendering the decree, even though such findings are not upon an actually contested hearing. As will be recalled, the Supreme Court in *Davis v. Davis* (1938) 305 US 32, 83 L ed 26, 59 S Ct 3, 118 ALR 1518, made binding upon the court in which the validity of the foreign divorce decree was questioned, the findings upon a contested hearing of the jurisdictional fact of domicil by the foreign court rendering the divorce decree. That case and the doctrine which it inculcates are treated in a comment note in 118 ALR 1524. Having gone to this

extent in that case, and having in the Williams Case (US) (reported herewith) ante, 1273, given to constructive service upon a nonresident defendant the same effect, at least as to extraterritorial recognition of the decree, as would be given to a personal service within the divorce forum or to appearance by the defendant, it seems that it would not involve a radical decision to hold that a finding, by the foreign divorce court as to the jurisdictional fact of domicile, is binding upon the courts of another jurisdiction, whether or not it was made upon a contested hearing. As said in the annotation in 118 ALR 1524, as to the doctrine in the Davis Case (and it may be repeated now as to the doctrine of the Williams Case), that doctrine 'constitutes a step towards the realization of a highly desirable rule that a decree of divorce, dissolving a status upon which the structure of the whole society rests, should be either valid in all the states or valid in none of them, and tends in part at least to eliminate the unfortunate consequences referred to in annotation in 39 ALR 685, involved in a doctrine which permits a decree of divorce, concededly sufficient to dissolve the marriage relation in the state where rendered, to be attacked in another state because a court of that state reaches a different conclusion as to the jurisdictional fact of domicile from that reached by the court which rendered the decree. As indicated in the annotation just referred to, that doctrine seems to present even a greater obstacle to the desired conclusion above referred to than does the doctrine which under some circumstances permits a court to refuse to recognize or give effect to a decree of divorce rendered in another state upon constructive service of process, since appearance by the defendant in the divorce suit avoids the effect of the latter doctrine, but does not, under all circumstances at least, avoid the former doctrine.'

Unless such a view as above suggested is adopted by the Supreme Court, the usefulness of the decision in the Williams Case, in remedying the mischief inherent in the rule in *Haddock v. Haddock* (1906) 201 US 562, 50 L ed 867, 26 S Ct 525, 5 Ann Cas 1, will be confined to a relatively small field, involving only those cases in which there is an actual and bona fide change of domicile by the plaintiff to the divorce forum, and the anomalous

phenomena of a husband with two wives and a wife with two husbands, or children legitimate in one state and illegitimate in another, more flagrant and common in cases where there is a total lack of establishment of any bona fide domicil at the divorce forum, will continue to prey upon the social order and the institution of the family.”

If a court is one which has jurisdiction over the subject of divorce, that is, authority to render divorce decrees, and if that court has jurisdiction over the person of the defendant, which is the situation in the present case, then the judgment or decree is entitled to full faith and credit. This has always been the law in several jurisdictions, and it must be the law in this jurisdiction, following the *Williams* case. Thus, in *Miller v. Miller*, 130 Pac. 681, 89 Kan. 151, it was held that the finding of domicile is as conclusive in a sister state as it is in the state in which the judgment was rendered. The court there said.

“Jurisdiction over the subject-matter, the plaintiff’s petition, and lawful service on the defendant gave the court jurisdiction to determine whether or not it had authority to proceed, and its judgment finding the fact is as conclusive as if both parties had actually appeared, and the case had been contested on the ground of the nonresidence of the plaintiff; it being settled law in this state that whenever jurisdiction depends on a fact properly litigated and determined in the action itself the judgment rendered is conclusive evidence of the fact and of jurisdiction, until it is reversed or is vacated in a direct proceeding for the purpose. * * *

“It is insisted, however, that the decree is void, because it must have been induced by false testimony and the suppression of evidence regarding Hiram Waymire’s residence; and, consequently, that jurisdiction was obtained by fraud. Authorities are numerous which sustain this contention, but * * * they are unsound. The fraud, if any, did not relate to an extrinsic or collateral matter, but to a matter inherent in the cause of action itself, which the Utah court was obligated to investigate and determine. That court was

just as competent to test the credibility of witnesses, sift evidence, and determine whether or not the burden of proof had been sustained as a Kansas court sitting for the trial of the same question 28 years later; and a wise public policy forbids the reinvestigation of adjudicated controversies, when the adjudication is collaterally attacked for fraud in some other proceeding.

'The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.' *United States v. Throckmorton*, 98 U. S. 61, 68, 25 L ed 93."

To the same effect, see *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945. The District of Columbia cases cited by appellant in support of her contention were all decided prior to the *Davis* and *Williams* cases, and therefore are not in fact controlling.

Appellant's further contention that the Nevada divorce should not be recognized in the District of Columbia because appellee perpetrated a fraud upon the court is without merit. In the leading case of *United States v. Throckmorton*, 98 U. S. 61, it was held that the giving of false and perjured testimony on a material matter does not constitute such fraud upon the court as to vitiate the judgment in a collateral attack. Thus, even assuming for purpose of argument that the appellee, in securing the divorce in Nevada, gave false testimony before the court in an effort to obtain a finding of domicile favorable to him, there was not the necessary element of fraud to permit this court to refuse to give recognition to the decree. See *Greene v. Greene*, 2 Gray 361, relied upon by the court in the *Throckmorton* case.

Certainly, it cannot be urged that the decree should be set aside because of fraud upon the District of Columbia,

because that was the contention in the *Davis* case, and the Supreme Court held, contrary to its ruling in the *Andrews* case, that it was without merit and the decree binding.

CONCLUSION.

The judgment of the lower court is one founded upon practical and logical consideration, resulting from a careful analysis of the *Williams* and *Davis* Cases. As stated above, the usefulness of the *Williams* case will be destroyed unless a rule such as was applied by the lower court is followed.

Respectfully submitted,

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